RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

RENICK *v.* BOYD.

Replevin will not lie at the common law by one out of possession of the realty against one in adverse possession under a claim of title for the recovery of chattels which have become such by severance from the realty.

Where a statute authorizes a recovery in replevin for timber, lumber, coal "or other property" severed from the realty, notwithstanding that the title to the land is in dispute, the words "other property" must be construed to mean other property *ejusdem generis* and do not include growing crops.

WRITS of error to the Court of Common Pleas of Chester county.

Two actions of replevin by J. Renick against J. Boyd to recover certain hay, oats and corn. Pleas, *non cepit* and property.

On the trial, before CLAYTON, P. J., the following facts appeared: The plaintiff had bought from the administrator of one Correy, certain land in Franklin township, Chester county, of which defendant was in the actual possession. Defendant claimed the land as his own, and refused to give it up. Renick subsequently took actual possession of a part of the farm, and planted and farmed it for a few months, but was forcibly dispossessed by defendant, who proceeded to harvest the crops. These actions were then brought to recover the crops which had been harvested. Meanwhile, an ejectment for the land in question had been brought by Renick against Boyd, and was pending at the trial of the replevin suits in the court below.

The court charged the jury, *inter alia*, as follows: "Under the evidence it clearly appears that at the time the grass, oats and corn were cut and harvested, the defendant was in actual, adverse possession of the land in dispute, by virtue of a claim of title; and, according to law, an action for replevin will not lie, under such circumstances, for the growing crops and products of land. * * *

"The defendant being in possession under a claim of right when the grass, oats and corn in dispute were cut and harvested, the plaintiff's remedy is in an action for damages. He cannot recover the thing itself, and your verdict should, therefore, be for the defendant in both cases."

Verdicts for defendants and judgments thereon. Plaintiff took these writs, assigning for error the charge of the court.

William M. Hays and *A. P. Reid*, for plaintiff in error.

C. H. Pennypacker and *J. J. Gheen*, for defendant in error.

The opinion of the court was delivered by

GREEN, J.—These were two actions of replevin brought to recover certain hay, oats and corn, after the same had been harvested, upon land of which the defendant was in the actual and adverse possession both before and at the time the crops were gathered. The plaintiff had brought an action of ejectment against the defendant to recover possession of the land, and this action was pending at the time the crops in question were severed from the freehold. The plaintiff claims that he is entitled to recover in this action under the provisions of the Act of May 15th 1871, P. L. 268. That act is as follows: "In all actions of replevin now pending or hereafter brought to recover timber, lumber, coal or other property severed from the realty, the plaintiff shall be entitled to recover, notwithstanding the fact that the title to the land from which said property was severed may be in dispute. Provided said plaintiff shows title in himself at the time of severance."

The learned judge of the court below held that this act was not intended to apply to the case of growing crops severed by the person in possession under claim of title to the land on which the crops were grown. In this opinion we concur. Prior to the passage of the act in question, it had always been held that replevin would not lie by one out of possession to recover against one in possession and claiming title, for any kind of chattels which had become such by severance from the freehold, of which they had previously formed a part. Thus, in *Brown* v. *Caldwell*, 10 S. & R. 114, it was held, that replevin does not lie by one not in the actual exclusive possession of land, whatever title he may claim, against one who is in the actual, visible, notorious, exclusive possession and occupation thereof, claiming the right for slates taken out of a quarry on the land.

In *Powell* v. *Smith*, 2 Watts 126, in the application of the same doctrine, we held that replevin would not lie to recover fixtures separated and removed from a mill. On page 127, GIBSON, C. J., said: "The principle which is to govern this case was settled in *Mather* v. *Trinity Church*, 3 S. & R. 509; *Baker* v. *Howell*,

6 Id. 476, and *Brown* v. *Caldwell*, 10 Id. 114, in which it was determined, on principle and authority, that the right of property in a chattel which has become such by severance from the freehold cannot be determined in a transitory action by the trial of the title to the freehold, because the title to land might otherwise be tried out of the county.

"An action of trover or replevin for such a chattel, therefore, does not lie by a plaintiff out of possession. * * * Independent of this technical inhibitory principle, which, however, is decisive, it would provoke much useless litigation, and be attended with great practical mischief, if an owner out of possession were suffered to harass the actual occupant with an action for every blade of grass cut, or bushel of grain grown by him, instead of being compelled to resort to the action for mesne profits, after a recovery in ejectment, by which compensation for the whole injury may be had at one operation." Other authorities are to the same point.

The Act of 1871 has doubtless changed this rule, so far as it relates to the particular forms of property there mentioned. These are timber, lumber, coal and *other property*, severed from the realty. It is claimed that growing crops come within the designation, "*other property*," and therefore that the act includes them also. But a very slight consideration of the act shows not only that they are not expressly mentioned, but that they are not necessarily implied under this general description. There are many other forms of property besides timber, lumber and coal, which constitute part of the realty. Thus slate, marble, iron ore, zinc ore and all other forms of minerals and ores in place, building stone and fixtures, and machinery of every description, which have been permanently affixed to the realty. To all of these the expression "*other property*" in the act may well be applied. They are of the same generic character with the other kinds of property expressly mentioned. That is, they are a part of the realty itself, and when converted into personalty, it is by an act of severance, such as works a conversion of timber, lumber and coal. Now growing crops are only ephemeral. They are produced not by nature as a part of the land, but by the labor of man, combined with the operations of nature, and are never intended to become permanently affixed to the freehold, but to be removed from it at maturity. The very purpose of their cultivation is to make them personalty. Hence, the spirit and meaning of the act

in no sense requires that they should be considered in the same category with such constituent elements of the earth as timber, lumber and coal. In *Allen's Appeal*, 32 P. F. Smith 302, the words of an act giving a preference for wages to persons employed "in any works, mines, manufactory or other business," &c., were construed to apply only to any other business, *ejusdem generis*. The same rule of construction applied here would exclude growing crops as not being of the same kind or class with those expressly named in the act. We consider that the purpose of the act was to remedy a different kind of evil which existed prior to its passage. Formerly, when one in possession cut down standing timber, or severed or removed coal, slate, ores or minerals from the realty, the only remedy of the true owner was by the action for mesne profits, or by estrepement or other proceeding to stay waste. But these were not adequate, as the tenant in possession could make way with and convert these articles, and being insolvent, a verdict and judgment for damages, or a mere preventive order staying future acts, furnished no sufficient relief, and we apprehend it was the purpose of this act to remedy this class of wrongs. These considerations are inapplicable, however, to the case of growing crops. They are generally the fruits of the labor of the tenant in possession, and it would be a most serious innovation upon the existing state of the law, as well as a great hardship upon the person in possession under claim of title, to subject him to a succession of actions for his various crops when harvested, and to the necessity of trying complicated and vexatious questions of title to land, in the determination of the ownership of his fruits, vegetables and crops.

Such a construction is not required by any reading of the act, and is, therefore, not necessary to be made.

Judgment affirmed.

It is a well-settled rule of law that if fixtures, timber trees, &c., constituting during their annexation to the soil a part of the realty, are tortiously severed therefrom and removed by a wrongdoer, or by a tenant without the consent of the owner of the fee, they become, at the option of the owner of the soil, personal property, and may either be retaken by him or his agent without process, by seizure and forcing them from the wrongdoer, using no more violence than is necessary for that purpose: *State* v. *Elliot*, 11 N. H. 540; or may be recovered by the owner in an action of replevin: *Snyder* v. *Vaux*, 2 Rawle 423; *Harlan* v. *Harlan*, 15 Penn. St. 507; *Christian* v. *Dripps*, 28 Id. 278; *Cresson* v. *Stout*, 17 Johns. 116; *Laflin* v. *Griffiths*, 35 Barb. 58;

Congregational Soc. of Dubuque v. *Fleming*, 11 Iowa 533; *Ogden* v. *Stock*, 34 Ill. 522; *Sands* v. *Pfeiffer*, 10 Cal. 258; *Richardson* v. *York*, 14 Me. 16.

The rule stated above is subject to the qualification, stated in the principal case, that the title to real property cannot be tried in a transitory action. "The plaintiff out of possession cannot sue for property severed from the freehold, where the defendant is in possession of the premises from which the property was severed, holding adversely in good faith under claim and color of title; in other words, the personal action cannot be made the means of litigating and determining the title to the real property as between conflicting claimants:" *Halleck* v. *Mixer*, 16 Cal. 574; *Brown* v. *Caldwell*, 10 S. & R. 114; *Powell* v. *Smith*, 2 Watts 126; *Snyder* v. *Vaux*, 2 Rawle 423; *Heaton* v. *Findlay*, 12 Penn. St. 307; *Anderson* v. *Hapler*, 34 Ill. 436.

The qualification above stated has been illustrated by a variety of cases, a few of which may profitably be referred to more particularly. In *Page* v. *Fowler*, 28 Cal. 605; s. c. 37 Id. 100, it was held that replevin for hay cut on public lands could not be maintained by a prior possessor against one in adverse possession claiming a pre-emption right when he cut the hay; to the same effect see *Page* v. *Fowler*, 39 Cal. 412; *Stockwell* v. *Phelps*, 34 N. Y. 363. The rule has been carried so far that where the plaintiff had recovered in ejectment land with a mill situated thereon, and, after judgment and before a writ of *habere facias possessionem* had been issued, the defendant while yet in actual possession severed and removed from the mill the bolting-cloth, meal-chest, mill-spindle, &c., for the recovery of which the plaintiff brought replevin, it was held that the recovery in ejectment was not equivalent to actual possession, and that replevin did not lie: *Powell* v. *Smith*, 2 Watts 126; referring to which decision, ROGERS, J., in *Harlan* v. *Harlan*, *supra*, said: "It is true there was a recovery in ejectment, but no *habere facias* had been issued, and, consequently, the possession of the defendant continued as before to be adverse. The remedy, therefore, was not replevin, but an action for mesne profits, or by writ of estrepement."

A mere intruder or trespasser, however, is in no position to raise the question of title with the owner so as to defeat the action: *Halleck* v. *Mixer*, *supra*; *Harlan* v. *Harlan*, 15 Penn. St. 507; *Kimball* v. *Lohmas*, 31 Cal. 154. There must be something more than a mere assertion of title, in order to warrant a judgment for the defendant, and the court in such cases will look into the case to see if there is in reality a claim of title to try. "It is not the actual possession, but it is the actual *adverse* possession of a person who claims *title* to it that is the criterion." * * * "The mere assertion of a title would be nothing. The court looks to the substance, and where it appears that in truth it is a trial of title, then it is properly ruled that replevin is not the proper action, but that it must be tried in another form. Beyond the cases do not go, nor does public policy require they should." ROGERS, J., in *Harlan* v. *Harlan*, *supra*; *Page* v. *Fowler*, 39 Cal. 412, 418. See, also, the remarks of SANDERSON, J., in *Kimball* v. *Lohmas*, *supra*.

From the cases cited, it clearly appears that upon authority the decision of the court upon the first point in the case is correct. The reasoning of the court upon the second point in the case, as to the effect of the Act of May 15th 1871, upon the right to maintain the action, is also so clear and conclusive as to render the citation of further authorities useless; and upon the whole there can be no doubt as to the entire correctness of the decision of the case.

MARSHALL D. EWELL.

Supreme Court of Indiana.

PERCELL v. ENGLISH.

The rule that a landlord not under contract to repair is not responsible to the tenant for injuries caused by a neglect to repair, applies to a case where the landlord hires out apartments to separate tenants, and the stairway, the neglect to repair, which caused the injury, was the common passage-way for the use of all the tenants.

A., the owner of a building, leased to B. rooms in the upper story. The approach to these rooms was by a stairway common to the use of all the tenants. The railing of this stairway had been suffered to get out of repair. The stairway became dangerous from ice and snow, and B., in attempting to descend slipped, and in falling caught the railing which gave way, precipitating B. to the ground. *Held*, that A. was not liable in damages.

A promise to repair made by the landlord after the lease is entered into, is a mere *nudum pactum*, and does not render the landlord liable for injuries caused by a failure to repair.

FROM the Marion Circuit Court.

This was an action by a tenant against her landlord to recover damages for injuries caused by the defective condition of the premises. The facts are sufficiently stated in the opinion which was delivered by

ELLIOTT, J.—The case made by the appellant's complaint, shortly stated, is this: She was the tenant of the appellee, having leased rooms in an upper story of a building owned by him; the approach to these rooms was by a stairway common to the use of all the tenants of the building; the railing of this stairway had been suffered to get out of repair and was rotten and loose; the stairway became dangerous and unsafe from ice and snow which covered the steps; the appellant, in attempting to descend, slipped, and in falling caught the railing which gave way, and she fell to the pavement and was seriously hurt. It will be observed that the complaint does not allege that the landlord had contracted to repair, but proceeds entirely on the theory that the duty rested upon him independently of contract.

The court, upon the close of the appellant's evidence, directed the jury to return a verdict for the defendant.

The court may, there is no doubt, direct the jury to return a verdict in favor of the defendant in a proper case: *Washer* v. *The Allenville, &c., Co.*, 81 Ind. 78; *Weis* v. *The City of Madison*, 75 Id. 241; *Haggard* v. *Citizens' Bank*, 72 Id. 130; *Dodge* v. *Gaylord*, 53 Id. 365; *Pleasants* v. *Fant*, 22 Wall. 116.

When the cause of action declared on is negligence the court may direct a verdict for the defendant, in cases where the evidence wholly fails to make out a *prima facie* case. It is true that the question of negligence is generally one of mingled law and fact, but there are cases where the question is purely one of law: *Binford* v. *Johnson*, 82 Ind. Where there is no dispute as to the facts, and no controversy as to the inferences that can be legitimately drawn from them, the question is one of law, and the court may rightfully take the case from the jury: 2 Thomp. on Neg. 1236, 1237; Thomp. Charging the Jury 23; *Toomey* v. *London, &c.*, 3 C. B. (N. S.) 146.

The right of the court to withdraw the case from the jury unquestionably exists in cases where negligence is the issue as well as in other cases; but whatever may be the character of the issue, the case cannot be taken from the jury if there are any facts proved from which the jury would by fair and reasonable inference be authorized to find for plaintiff. All reasonable inferences, not, however, forced and violent ones, are to be indulged in favor of the plaintiff on such a case, for the rule is substantially the same as that which obtains in cases where there is a demurrer to the evidence: *Hazzard* v. *Citizens' Bank*, 72 Ind. 130; *Steinmetz* v. *Wingate*, 42 Id. 574; *Wilcuts* v. *North Western, &c., Co.*, 81 Id. 30; *Fritz* v. *Clark*, 80 Id. 591. If the evidence given upon the trial of this cause can by fair intendment, or reasonable inference be deemed to make out the cause of action declared on, then the appellant is entitled to a reversal. It is not sufficient even upon a demurrer to the evidence, that the plaintiff make out some cause of action; but it is incumbent upon him to make out the cause of action set forth in his complaint. He cannot declare on one cause of action and recover upon another. There is in this complaint no allegation that the appellee had agreed to keep the demised premises in repair, and even if a contract had been proved, it is doubtful whether the appellant could have been allowed to succeed on the theory that there was a contract. But waiving this point, and going to the evidence, we are clear that no contract was proved. The utmost that can be claimed is that the evidence tends to show a voluntary promise, made after the contract for the letting of the premises had been entered into. This evidence did not establish, nor tend to establish, a contract on the part of the landlord to repair; for it did no more than show a mere gratuitous

promise creating no binding obligation. The rule upon this subject is thus stated in a recent work: "A promise to repair, made after the lease is entered into, is a mere *nudum pactum*, and no liability exists on his (the landlord's) part for a failure to make such repairs:" Wood's Land. and Tenant, sect. 382; *Libbey* v. *Tolford*, 48 Me. 316; *Gill* v. *Middleton*, 105 Mass. 477; s. c. 7 Am. Rep. 548; *Doupe* v. *Genin*, 37 How. Pr. 5; s. c. 45 N. Y. 119.

The case is therefore to be treated as one in which there is no contract, on the part of the landlord to repair.

Where there is no duty, there can be no actionable negligence: Cooley on Torts 659; Add. on Torts, sect. 28; Whart. on Neg., sect. 3. In cases of the class to which the present belongs, three of the essential things which the plaintiff is required to establish, are the existence of a duty, that it is owing to him, and that it has not been performed. The material part of the appellant's case could not be made out without showing a duty owing to her from her landlord to keep the demised premises in repair. The duty of the landlord to repair does not arise out of the relation of landlord and tenant; on the contrary, the relation devolves that duty upon the tenant. It is only where the landlord contracts to maintain the premises in repair that he is burdened with that duty. The logical conclusion from this principle, and a more firmly settled one there is not in all the books, is that a landlord not under contract to repair, is not, as a general rule, responsible to the tenant for injuries caused by a defective condition of the demised premises. In a carefully written article in the American Law Review, the authorities are reviewed, and the rule deduced that there is no warranty, express or implied, as to the condition of the demised premises, and that the tenant must determine for himself the safety and fitness of the premises for use and occupancy: 6 Am. Law Rev. 614; Taylor on Land. and Tenant, 6th ed., 381. This is the rule adopted by our own cases: *Estep* v. *Estep*, 23 Ind. 114, vide authorities cited, page 116. Ordinarily, therefore, a tenant who leases property takes upon himself all risks, except, perhaps, as against latent defects not discoverable by the use of ordinary diligence, and cannot recover damages from his landlord because of an omission to make the premises habitable or safe. Whether a tenant would have a right to abandon the premises if the means of access to them had become unsafe and dangerous

is not here the question. The question here is, whether the tenant continuing in possession and making use of the premises, can recover damages for personal injuries caused by the unsafe condition of the means of ingress and egress? There are cases, we may remark in passing, holding that even where the landlord covenants to make repairs and fails to do so, the tenant must, where the expense is not great, make them and charge them against the landlord: *Cook* v. *Soule*, 56 N. Y. 420; *Loker* v. *Damon*, 17 Pick. 284; *Miller* v. *Mariner's Church*, 7 Me. 51; *Benkard* v. *Babcock*, 2 Rob. 175. The duty of the tenant to keep in safe condition for his own use the demised premises extends to all the appurtenances connected therewith, and this includes steps, stairways and other approaches. Whatever passes to the tenant under the lease, is for the term designated, under his control and in his possession: *Pomfret* v. *Ricroft*, 1 Saund., 5th ed., 321; Wood on Land. and Tenant, sect. 213; Auth. *n.* 371. If he neglects to make repairs, and suffers the premises to become unsafe, it is clear that in ordinary cases, at least, no action will lie against the landlord for injuries suffered by the tenant, and caused by the unsafe condition of the premises arising from the neglect to repair. It is obvious, from this statement of fundamental principles, that in cases of an ordinary tenancy, the tenant cannot maintain an action against the landlord for injuries caused by the neglect to repair the demised premises, unless the landlord has expressly covenanted to repair.

If the appellant can maintain this action it must be because her case possesses some elements which carry it out of the general rule. The only element in this case which can with any plausibility be said to distinguish it from ordinary cases of tenancy, is that the landlord hired out apartments to separate tenants, and that their common stairway was the common passage for the use of all. It is difficult to perceive how this fact can exert a controlling influence upon the question of the landlord's liability, for, whether the premises are demised to one or to many tenants the principle upon which rests the landlord's immunity from the burden of repairing is not changed, nor does it change the effect of the contract by which the premises are demised. As said by a writer, already referred to: "For a tenant is at once a bailee and a purchaser; he is a bailee because of his ownership being determinable and not absolute; yet being exclusive while it lasts, he is, by the mere fact

of the demise, and in the absence of special undertakings to that effect, charged with a trust to restore the property in substantially the same condition as when he took it:" 6 Am. Law Rev. 614. It would seem clear, on principle, that the landlord's duty is the same whether he demises to one or to many tenants, so far as concerns his liability to a tenant for personal injuries caused by a failure to repair. In *Humphrey* v. *Wait*, 22 Upper Canada C. P. 580, the plaintiff had hired apartments of the defendant in a building occupied in part by other tenants, and sustained injuries by stepping through a hole in the floor of a common passage-way leading to the apartments, and it was held that an action could not be maintained against the landlord, and a nonsuit was directed. In the course of the opinion delivered in that case, HAGARTY, C. J., said: "It would be a singular state of the law if a landlord would not be answerable if he demised the stairway with the upper story, and would be answerable if he only gave a right to use the part of the house actually demised." In *Gott* v. *Gandy*, 2 E. & B. 845, Lord CAMPBELL, said: "Now let us see what are the facts alleged. They are these: the defendant was the landlord of the premises which were let to the plaintiffs from year to year; during the tenancy the premises were in a dangerous state for want of substantial repairs; the defendant had notice from the plaintiff, and was requested to repair them, and did not do so. There is no allegation of any contract to do substantial repairs. It lies therefore on the counsel of the plaintiffs, who are the actors, to establish on authority or on principle, that this obligation results from the relation of landlord and tenant. Mr. Russell can produce no authority in his favor, not even a dictum. And I have heard of no legal principle from which it would follow that the landlord was bound to repair the premises."

In *Cartairs* v. *Taylor*, L. R., 6 Ex. 216, the doctrine was carried to the extent of holding that there is no liability on the part of the landlord who himself occupied a part of the premises, unless it is shown that he was negligent with respect to the particular act which caused the injury. The English cases agree in holding that for injuries for a failure to repair, no action will lie by the tenant against the landlord: 1 Add. on Torts 240; Smith on Land. and Tenant 206; *Robbins* v. *Jones*, 15 C. B. N. S. 221; *Payne* v. *Rogers*, 2 H. Bl. 350.

Turning to the American authorities, we find in one of our

books this statement of the rule, whether too broad or not we need not stop to inquire: "The liability of the landlord exists only in favor of persons who stand strictly upon their rights as strangers:" Sherman and Redf. on Neg., sect. 503. Another author says: "An owner being out of possession, and not bound to repair, is not liable in this action (*i. e.*, for nuisance), for injuries received in consequence of his neglect to repair:" Whart. on Neg., sect. 817. In still another work, it is said, in speaking of a landlord's liability: "Nor in the absence of a covenant to repair is he liable for injury resulting from the faulty construction or condition of the premises, the control over which is in the hands of a tenant, either to a tenant or third persons:" Wood on Land. and Tenant, sect. 384; 1 Thomp. on Neg. 323. In 14 How. Pr. 163, the action was for injuries received from falling down a stairway forming a common passage-way, by one tenant occupying part of premises, also occupied by other tenants of the same landlord, and it was held that no action could be maintained. The same general principle is declared in the cases of *Doolittle* v. *Howard*, 3 Duer 464; *Robbins* v. *Mount*, 33 How. Pr. 24. In *Kaiser* v. *Hirsh*, 46 How. Pr. 161, it was held that an owner who occupied a part of the house was not liable for an injury to a visitor to one of his tenants, unless it was shown that his (the landlord's) negligence was the cause of the injury, and that the fact that he occupied a part of the premises created no presumption against him; a like doctrine is declared in *Moore* v. *Goedel*, 34 N. Y. 527. The Supreme Court of California, held in the case of *Loupe* v. *Wood*, 51 Cal. 586, that there was no liability on the part of the landlord arising from the defective condition of the walls of the cellar.

We have examined the cases cited by the appellant, and do not find any of them in point. The cases in the Georgia Reports are not in point, because they are founded upon an express statute making it the duty of the landlord to repair. The cases of *Godley* v. *Hagerty*, 2 Penn. St. 387, and *House* v. *Metcalf*, 27 Id. 600, were actions by a stranger, and are therefore not in point.

Fisher v. *Thirkell*, 21 Mich. 1; s. c. 4 Am. Rep. 422, is against rather than in favor of the appellant. In that case the landlord was held not to be liable to one who suffered an injury by falling through a scuttle in a sidewalk adjoining premises in the possession of a tenant. The other case cited, *Shindelbeck* v. *Moon*, 32 Ohio St. 264; s. c. 30 Am. Rep. 584, is also against the doc-

trine maintained by counsel. In that case the injury was occasioned by the accumulation of ice upon steps leading into a storeroom owned by the defendant, but occupied by a tenant; and the holding was that the landlord was not liable for injuries sustained by a stranger. In closing the opinion it was said: "And again it was the ice that occasioned the accident. It is not averred that it was the duty of the landlord to remove this ice, nor does it appear that he was called upon to do it. If this ice was a nuisance to the passing public, endangering their lives and limbs, it was a nuisance arising during the continuance of the lease. It was a thing temporary in its nature, a defective condition of things such as the tenant was called upon to remedy, and not the landlord, as between landlord and tenant."

We have, in our investigation, found one case which lends support to the general doctrine for which appellant's counsel contend. The case to which we refer is that of *Looney* v. *McLean*, 129 Mass. 33; s. c. 37 Am. Rep. 295. In that case the wife of the tenant of a part of a tenement-house occupied by several families, was injured by the giving way of one of the steps of the stairway leading to the roof of a shed used in common by the tenants for the purpose of drying clothes; and it was held that an action would lie against the landlord.

The question is not discussed, and only cases from Massachusetts are cited, and they do not decide the point. On the contrary, such of them as apply to the relation of landlord and tenant, recognise the rule that the landlord is not liable to the tenant for a failure to repair. Two of them do not touch upon the subject of a landlord's liability. One of the two is upon the question of the liability of a railroad company which constructs a passage-way across a public street, and the other is upon the same general question. But conceding the soundness of the ruling in that case it does not apply to the case at bar, for here the cause of the injury was not the defective construction of the stairway, or its unsafe condition at the time the premises were leased. The stairway here is directly connected with the part of the premises leased to the appellant; in the Massachusetts case it was otherwise. Here the thing which made the stairway unsafe was the temporary covering of snow and ice. While in the Massachusetts case the unsafe condition was permanent and had long existed. It is not necessary for us in the present case to lay down any general rule upon the subject of a

landlord's liability to a tenant occupying apartments in a tenement-house occupied by other tenants. It is sufficient for us to ascertain and state a rule governing cases such as that made by the evidence before us. We are satisfied the authorities warrant us in adjudging that where a stairway connected with the apartments hired in a tenement-house, occupied by several tenants, is rendered unsafe by temporary causes, such as the accumulation of snow and ice, the landlord is not liable to the tenant who uses such a stairway, with a full knowledge of its dangerous condition, unless there is a contract on the part of the landlord to keep the premises in repair and fit for safe use. Any other rule would entail upon landlords a grievous and unjust burden—cast upon them a duty which long-settled rules has imposed upon the tenants and which results in imperilling the interests of an owner out of possession and relieving those in possession of his property from that care which the law imposes upon bailees and others occupying analogous positions. If any other rule is adopted then the owner is charged with the duty of watching steps leading to every part of the premises, and of keeping them free from all temporary obstructions. For let it once be granted that the landlord is liable for obstructions or defects not permanent and not growing out of the character of the structure, it will be impossible to draw any line, and he must be held accountable for all obstructions and defects, no matter how transient their character. Whether a landlord hiring apartments to many tenants is liable for latent defects or for faults in the construction, or for permanent defects in the common passage-ways, we do not decide. The evidence before us shows that the ice and snow made the stairway unsafe and caused the accident. But for the ice and snow which the tenant could have removed with very little labor, or at a trifling expense, the appellant could have used the stairway in perfect safety. We are satisfied that the court below was right in holding that the cause of the accident was the accumulation of the ice and snow upon the stairway, and that for an injury resulting from such a cause, a landlord, who had made no covenant to repair, is not liable.

Judgment affirmed.

Referring to the duty of a landlord in the absence of a stipulation to repair, ERLE, J., says, that the relation of landlord and tenant gives rise to questions more frequently than any other relation; so we should expect to find an example

affirming the landlord's duty if it existed, but there is none: *Gott* v. *Gandy*, 23 L. J., Q. B. 1.

The common law of England casts the burden on the tenant, in ordinary cases, to repair: *Ferguson* v. ———, 2 Esp. 590; Taylor, Landlord & Tenant, sect. 327 (7th ed.).

American cases adopt this rule: *Jaffe* v. *Harteau*, 56 N. Y. 398; *Biddle* v. *Reed*, 33 Ind. 529; *Corey* v. *Mann*, 6 Duer 679; *Casad* v. *Hughes*, 27 Ind. 141; *Smith* v. *Kinkaid*, 1 Brad. 620; *Vai* v. *Weld*, 17 Mo. 232; *Krueger* v. *Farrant*, 13 N. W. Rep. 158.

The doctrine of *caveat emptor* applies to a tenant taking possession of the premises. He has opportunity for inspection, and he cannot claim immunity from or reimbursement for defects in the premises at the time of the demise: *Hart* v. *Windsor*, 12 M. & W. 68; *Gott* v. *Gandy*, *supra*, per Lord CAMPBELL; *Cleves* v. *Willoughby*, 7 Hill 83; *Dutton* v. *Gerrish*, 9 Cush. 89; *Welles* v. *Castles*, 3 Gray 323; *Keats* v. *Cadogan*, 10 C. B. 591.

But if there is a latent defect within the landlord's knowledge, and he rents the premises, he is liable for damages that may accrue to his tenants, as where the owner of a house knowing it to be infected with contagious diseases, leases it for the purposes of habitation without disclosing the fact to one who is ignorant of its condition: *Minor* v. *Sharon*, 112 Mass. 477; s. c. 17 Am. Rep. 122. To the same effect *Cesar* v. *Karutz*, 60 N. Y. 229; s. c. 19 Am. Rep. 164.

However, in case of a pasture let by the owner over which had accidentally been spread, without his knowledge, a poisonous substance which kills the cattle feeding in the pasture, the tenant is not released from his liability to pay the rent or abandon the pasturage: *Sutton* v. *Temple*, 12 M. & W. 52.

The doctrine laid down in the principal case that the stairway was appurtenant to the premises of the tenant, and being under her control and in her possession she was liable for repairs, does not accord with principles enunciated in some decisions in the Massachusetts Supreme Court:

In a case in that court MERRICK, J., says, "It is undoubtedly a well-settled principle of common law that the occupier and not the landlord is bound, as between himself and the public, so far to keep buildings, and other structures abutting upon common highways, in repair, that they may be safe for the use of travellers thereon, and that such occupier is *prima facie* liable to third persons for damages arising from any defect; but the defendants cannot avail themselves of that principle in defence of this action. Although all the separate parts of their building, consisting of cellars, stalls and disconnected chambers, were leased either at will or for a term of years to many different tenants, yet the defendants had a general supervision over the whole and had the entire control of the outside doors and outside passage-ways so far as was necessary to enable them to make repairs; the obligation to do which rested exclusively on them. They also kept the key of the market-room, and opened and closed the doors of it at certain fixed hours, conforming, however, in respect to the time of doing it, to the wishes of the tenants. Under these circumstances there was no such occupancy by the tenants as would cast upon them the obligation of keeping the building in repair, or to make them responsible to third persons for damages resulting from its defects; but the liability in that particular continued to rest on the owner:" *Kirby* v. *Boylston, &c., Association*, 14 Gray 250.

"There is no implied warranty in the letting of a house that it is safe and fit for habitation. A lease does not imply any particular state of the property let, or that it shall continue fit for the purposes for which it is let; unless other-

wise stipulated the tenant takes the premises as they are, and must pay the rent for the term. But this rule applies only to premises which, by the terms of the lease, have passed out of the control of the landlord into the exclusive possession of the tenant. Where a portion of a building is let, and the tenant has rights of passage-way over staircases and entries in common with the landlord and the other tenants, there is no such leasing as will exonerate the landlord from all responsibility for the safe condition of that portion of which he still retains control, and which he is bound to keep in repair; as to such portion, he still retains the responsibilities of a general owner to all persons, including the tenants of his building. The case shows that the plaintiff had a simple right of access to the shed over this staircase, as incident to her occupation of the premises leased to her. The duty of the defendant, having still the possession and control of the same was to protect her from injury in that right by the use of reasonable care on his part. The stairway was apparently intended to furnish a passage-way for her use, and the defendant is responsible for injuries received by one entering upon the same by his invitation or procurement, express or implied:" *Looney* v. *McLean*, 129 Mass. 33.

The defendants owned a building, consisting of three shops, standing forty feet back from the line of Essex street in Lawrence, and having a wooden platform extending from it to the sidewalk of Essex street. Oral leases of these shops were made to each tenant. The platform had no fences or lines of any kind separating the parts thereof in front of the several shops from each other, but was entirely open, so that persons passed over it in any direction in going to either of the shops. The plaintiff, without negligence, was injured by a defect in the platform. The court said, "If the lease to each tenant was of the shop occupied by him, and the landlord had constructed a platform for the common use and benefit of all the shops and of the public, there would be no presumption, in the absence of any agreement to that effect, that the tenants were to keep the platform in repair. Neither tenant acquired any exclusive right to use or control the part of the platform in front of his shop, and there was no such leasing of the platform as would exonerate the landlord from responsibility for defects in it."

The following instruction given in the court below was approved, to wit: "The presumption of law would be that such a platform, in the absence of any agreement, between the landlord and tenants of such shops as to repairs of it was to be repaired by the landlord. Such a platform would be like the single staircase provided by the landlord of a building consisting of several stories, divided into numerous tenements, occupied by different tenants, all of whom had right of ingress and egress into and from the building and their respective tenements by means of the common staircase, and all of whom might be presumed to be obliged to repair their respective tenements, and none of whom could be presumed to be obliged to repair the staircase, common to the use of every one of them and of their tenements:" *Readman* v. *Conway*, 126 Mass. 374.

In *Humphrey* v. *Wait*, 22 Upper Canada 587, HAGARTY, C. J., said: "If the plaintiff had become tenant to the defendant of the whole house, in the absence of express covenant or agreement, it is clear she would have no cause of action against him for non-repair. Her counsel, admitting this principle, seeks to put her claim on a better footing by saying, that with the part of the house demised, she had also granted to her a right of way over the passages for ingress and egress. She became tenant of the room while the hole was open in the passage. So long

as the landlord did nothing in the way of commission to derogate (as it were) from his own grant, she has, I think, no remedy. We may concede that he could not place any obstruction on the passage to hinder her use of it; but he was not, I consider, bound to repair and uphold it. It just amounts to this: A man owns a house in an almost ruinous state; another rents it from him as it stands; the latter has no remedy and must pay his rent. So if a man rent the upper story of a house with the staircase—the only means of approach—in a ruinous and unsafe state, I see no implied obligation on the landlord to uphold it or to answer in damages for an injury resulting from its insecure state."

In *Sullivan* v. *Waters*, 14 Ir. C. L. 460, it is said: "A mere license given by the owner to enter and use premises, for which the licensee has full opportunity, which contain no concealed cause of mischief, and in which any existing source of danger is apparent, throws no obligation upon the owner to guard the licensee against danger."

The owners of a pier are liable for injuries sustained by an individual, by reason of its defective construction and dangerous condition, notwithstanding the premises are at the time in the possession of a tenant, who has covenanted to keep the pier in repair, if the defects existed when the owners leased the property to him: *Moody* v. *Mayor, &c.*, 43 Barb. 282.

The occupant of apartments in a tenement is not bound either to see to the erection of a proper sink or privy upon the premises, or to cause them to be emptied to prevent an overflow. This duty devolves upon the landlord: *Fash* v. *Kavanagh*, 24 How. Pr. (N. Y.) 347.

The lessor is bound to make such repairs as are necessary to make the premises secure and safe for the purposes for which they are rented; and if their insecurity is known to him it is negligence not to do so. *Johnson* v. *Dixon*, 1 Daly 178.

A landlord was told that an outbuilding was in an unsafe condition, and he undertook, gratuitously, at the request of his tenant, to make it safe; he not only assumed to do the work, but he notified the tenant when it was done, invited him to use such building, assuring him it was perfectly safe. It proved unsafe, and the tenant's wife was injured thereby. The landlord was held liable. *Gill* v. *Middleton*, 105 Mass. 477.

A landlord's liability to the tenant depends on the exclusiveness of his possession and active control: Taylor, Landlord and Tenant, sect. 175; *Tenant* v. *Goldwin*, Lord Raymond 1089; *Priest* v. *Nichols*, 116 Mass. 401.

The servants of the occupants of an upper tenement accidentally left open a faucet, thereby causing the water to overflow and flood the tenement below. It was held that the occupants of the upper tenement were liable for damages thereby done: *Simonton* v. *Loring*, 68 Me. 164.

A stipulation "to repair" binds the lessee to rebuild in case of loss of fire during the term: *Nave* v. *Berry*, 22 Ala. 382.

For a covenant to repair is a covenant to rebuild: *Fowler* v. *Payne*, 49 Miss. 32.

Where premises are leased for a term of years, and the lessor does not covenant to rebuild the destruction by fire of the building rented will not exempt the lessee from the further payment of rent. He must pay for the whole of the term: *Gibson* v. *Perry*, 29 Mo. 245.

Prima facie a tenant is liable to answer for any neglect in the repair of fences or party walls, or for any improper use of the premises for the fixtures thereon, or for a nuisance kept on the premises, or for an obstruction of the highway adjacent: Taylor, sect. 178; *Chicago* v. *Brennan*, 65 Ill. 160; *Rider* v. *Smith*, 3 T. R. 766; *Regina* v. *Watts*, 1 Salk. 357.

CHARLES THOMPSON.

Supreme Court of Michigan.

WOOD *v.* BARKER.

In a suit by a physician to recover compensation for his services, where the only testimony as to the value of the services and the propriety of the treatment is the opinion of other physicians, it is error to instruct the jury that they may disregard this opinion and use their own judgment on the question of value.

While the value of a physician's services, at a given time and place, may be known to other persons than physicians, there is no legal presumption and no reasonable probability that all jurymen have this knowledge, and upon a question of medical skill, it is error to allow the jury to draw adverse conclusions which could only be based upon their unprofessional notions as to how the injuries should have been treated.

ERROR to Chippewa.

Charles S. Cushman and *W. S. Humphrey*, for plaintiff.

Geo. W. Brown, for defendant.

The opinion of the court was delivered by

CAMPBELL, J.—Plaintiff, who is a surgeon, sued defendant on his promise to pay for professional services rendered to one Murray, who had been injured by a blast so that both legs were badly crushed below the knee. Plaintiff was called in as counsel to aid the attending surgeon, Dr. Harding, shortly after the accident, at Sault Ste. Marie. The left leg was amputated, and they were both of opinion that amputation of the other was expedient, by reason of the extensive comminuted fracture of the bones and laceration involving injury to an artery, to prevent extreme danger of death. The opposition of Murray to this prevented the amputation and the limb was ultimately saved, but not entirely restored to its original condition. Some time after the plaintiff had ceased his visits and while the case was in the hands of Dr. Harding, aided by a nurse, Dr. Jessop of Mackinaw came over and was employed to treat the patient in connection with Dr. Harding. The only medical testimony in the case was given by plaintiff and Dr. Harding. Dr. Jessop was not sworn. The employment by defendant seems to have been shown, and the questions on which the controversy appears to have turned were the value of the services and the propriety of the treatment.

It is to be observed that there is no conflict of testimony whatever in regard to the fact of the work and attendance of plaintiff.

and no testimony which did not leave a considerable sum due him if those services were properly rendered. The court in charging the jury told them in substance that they were at liberty, if not satisfied with the testimony of the experts, to use their own judgment on the question of value. They were also instructed that if plaintiff's course was unskilful, they might reduce the fees accordingly, as in their judgment should be deemed proper. They gave plaintiff nothing. There can be no presumption of law concerning the value of a surgeon's services and there is no presumption that a jury can ascertain it without testimony of some kind, from persons knowing something about such value. As already suggested there was positive testimony of value not discredited, and, in the case of Dr. Harding, given by a disinterested witness called for important purposes by the defendant himself. We can see no sufficient reason for the suggestion that all of this testimony might be disregarded, and there is no rule which would allow the jury to entirely ignore the testimony, and at the same time to form an independent conclusion without testimony upon a matter which required proof beyond their conjecture or their opinion. We do not say that the value of a physician's services at a given time and place may not be known to other persons than physicians, if they have been in a position to learn the customary or proper rates. But there is no legal presumption and no reasonable probability that all jurymen have this knowledge. And there can be no safety to any one if juries are to use their own unguided views on such matters.

Neither was there any evidence which would justify the jury in reducing the otherwise appropriate compensation on the ground that plaintiff's treatment was improper. There was no such evidence. The fact that the injured limbs were slow in healing and imperfectly healed at last does not necessarily show that the treatment was improper. The injuries as described were of a very aggravated nature, and beyond any ordinary fracture, the limbs being bruised and badly lacerated, the bones crushed and an artery torn. Both medical witnesses were of opinion that there was danger in leaving the right leg on. There is nothing to show that the course taken under plaintiff's oversight was not the proper one, and nothing to show that when he left the case in the hands of the regular surgeon and nurse, anything necessary had been omitted or anything done out of the way. On the contrary, not only the

plaintiff but Dr. Harding gave positive testimony the other way. There is nothing to show that the plaintiff did not possess and use competent skill. The fact that some time later Dr. Jessop made some change in the management of the remaining limb had no tendency to show that the previous treatment was not proper at the time, and no one testifies that it was not. Dr. Harding's testimony indicates entire harmony of views, and Dr. Jessop is not produced to contradict him. No other medical testimony is offered to show any failure of skill or any mistake in the treatment.

Where all the testimony in the case is in favor of the treatment pursued, and the question is one of medical skill, which can only be tested by those familiar with such matters, it was error to let the jury draw adverse conclusions, which could only be based on their unprofessional notions of how such injuries should be treated. The fact that Murray survived is not evidence that his case was not desperate in appearance or in fact, and the fact that his limb is not restored to perfect soundness is no proof that he has been maltreated. The jury could not rightly be allowed to find malpractice without testimony from persons who were qualified to give opinions on the methods of treatment.

The judgment must be reversed with costs and a new trial granted.

(The other justices concurred.)

Sometimes on the ground of special skill in the witness, and sometimes upon the ground of the impossibility of describing in adequate language matters which have been previously presented to his personal observation, opinions are admitted in evidence in courts of justice. To prove value, opinion evidence is resorted to as a general rule from necessity, not only where the subject of such testimony is a matter of common knowledge, but also where it is of a kind requiring special skill to explain or appraise it. There are many things whose value any one may testify to, it being a matter of common knowledge, and not one requiring special and peculiar study, observation or skill. Thus, every one may be presumed to have a somewhat correct idea of the value of property which is in almost universal use. Thus the question is as to the value of a cow. Here the opinion of an ordinary witness would be sufficient, and would be admissible. Again, the question is as to the value of a steam engine, or a diamond. Here the opinion of an ordinary witness would neither be sufficient nor admissible: *Ohio, &c., Railroad Co.* v. *Irvin*, 27 Ill. 179 (1862). So it has been held that an ordinary article of clothing may have its value proved by a wearer of such garments who has made inquiries as to their price for the purpose of purchase: *Printz* v. *People*, 42 Mich. 144 (1879). In a Mississippi case, the question was as to the value of a gun, and it was held that the opinion of an ordinary witness was competent: *Cooper* v. *State*, 53 Miss. 398 (1876). "In the nature of things," said the court, "the value

of this sort of property in such common use can be estimated by almost every man in the community. It is not like painting, or precious stones, of which experts alone can form an intelligent judgment, but is rather like that class of merchandise and commodities of the value of which most persons have knowledge." And in Indiana, it has been ruled that "it does not require a knowledge of any particular science, art or skill to enable one to testify as to the value of board and lodging:" *Chamness* v. *Chamness*, 53 Ind. 301 (1876).

"It is not necessary, in order to qualify one to give an opinion as to values, that his information should be of such a direct character as would make it competent in itself as primary evidence. It is the experience which he acquires in the ordinary conduct of affairs, and from means of information such as are usually relied on by men engaged in business for the conduct of that business, that qualifies him to testify:" WELLS, J., in *Whitney* v. *Thacher*, 117 Mass. 526 (1875). Therefore, though as a general thing, a witness, not an expert, cannot be said to be qualified to express an opinion as to the value of a thing, unless he has seen it: *Westlake* v. *St. Lawrence Mutual Ins. Co.*, 14 Barb. 206 (1852); *Todd* v. *Warner*, 48 How. Pr. 234 (1874); or has some special knowledge of its value: *Sanford* v. *Shephard*, 14 Kans. 228 (1875); *Elfel* v. *Smith*, 1 Minn. 126 (1854); *Whitmore* v. *Bowman*, 4 G. Greene 148 (1853); *Selma, &c., Railroad Co.* v. *Keith*, 57 Ga. 178 (1874); *Haight* v. *Kimbark*, 51 Iowa 13 (1879); *Clussman* v. *Merkel*, 3 Bosw. 402 (1858); still there is no rule of law, and there can be none, defining how much a witness shall know of property before he can be permitted to give an opinion of its value. He must have some acquaintance with it, sufficient to enable him to form some estimate of its value, and then it is for the jury to determine how much weight to attach to such estimate: *Bedell* v. *Long Island Railroad Co.*, 44 N. Y. 367 (1871). A stricter rule is adopted in Rhode Island, for there a witness is required to show the possession of some peculiar skill and knowledge on the subject, before he will be permitted to give an opinion as to the value of land or other property: *Buffum* v. *New York, &c., Railroad Co.*, 4 R. I. 221 (1856); *Forbes* v. *Howard*, Id. 364 (1856). Nevertheless, in other states, some special information (unless the matter is one of common and universal knowledge) must be shown to be possessed by the witness whose opinion is asked. An adjudged case or two will illustrate this. In *Schmidt* v. *Herfurth*, 5 Robt. 145 (1867), the witnesses whose opinions as to value were asked, were held not sufficiently qualified to testify. There the question was upon the value of a Prussian thaler in United States currency. Two witnesses were called. One had bought bills of exchange in that money in Europe, he could not tell precisely its value in American currency, as he depended on the value of gold which he only knew from reading American newspapers abroad. The other was a soldier in the United States army, and did not show any special knowledge of the matter. Their opinions were rejected. In another case, the question was as to the value of a mill and privilege. A. testified that he was something of a judge of the real estate in the vicinity, but had no special knowledge of the value of mills or mill privileges on the stream; he had never bought, sold, owned or operated a mill. His opinion was inadmissible: *Clark* v. *Rockland Water Power Co.*, 52 Me. 77 (1860). "The witness," said the court, "distinctively negatives the idea that he was possessed of peculiar knowledge or skill in relation to the matter upon which his opinion was desired. It cannot be necessary to cite authorities to show that the opinions of a witness thus

situated are not admissible in evidence as an expert." The qualification of a witness to express an opinion as to value is a matter to be decided by the trial court: *Shattuck* v. *Stoneham Branch Railroad Co.*, 6 Allen 117 (1863).

I. VALUE OF REAL PROPERTY. The market value of land is not a question of science and skill upon which only an expert can give an opinion. Persons living in the neighborhood may be presumed to have a sufficient knowledge of the market value of property from the location and character of the land in question: *Pennsylvania, &c., Railroad Co.* v. *Bunnell*, 81 Penn. St. 426 (1876). Therefore, except in one state, it is held that the value of real property may be proved by the opinions of witnesses on the subject: *Brown* v. *Corey*, 43 Penn. St. 495 (1862); *Cleveland, &c., Railroad Co.* v. *Ball*, 5 Ohio St. 568 (1856); *Atlantic, &c., Railroad Co.* v. *Campbell*, 4 Id. 583 (1858); *Dalzell* v. *City of Davenport*, 12 Iowa 440 (1861); *Evansville, &c., Railroad Co.* v. *Cochran*, 10 Ind. 560 (1858); *Ferguson* v. *Stafford*, 33 Id. 162 (1870); *Sater* v. *Burlington, &c., Railroad Co.*, 1 Iowa 386 (1855); *Henry* v. *Dubuque, &c., Railroad Co.*, 2 Id. 289 (1855); *Dalzell* v. *City of Davenport*, 12 Id. 437 (1861); *Holton* v. *Commissioners of Lake Co.*, 55 Ind. 194 (1876); *Tate* v. *Missouri, &c., Railroad Co.*, 64 Mo. 149 (1876); *Warren* v. *Wheeler*, 21 Me. 484 (1842); *Carpenter* v. *Robinson*, 1 Holmes 73 (1871); *Brown* v. *Providence, &c., Railroad Co.*, 5 Gray 35 (1855); *French* v. *Snyder*, 30 Ill. 344 (1863); *Laswell* v. *Robbins*, 39 Id. 210 (1866); *Cooper* v. *Randall*, 59 Id. 317 (1871); *Lafayette, &c., Railroad Co.* v. *Winslow*, 66 Id. 219 (1872); *Green* v. *City of Chicago*, 97 Id. 374 (1881); *Frankfort, &c., Railroad Co.* v. *Windsor*, 51 Ind. 238 (1875); *Shaw* v. *City of Charlestown*, 2 Gray 107 (1854); *Walker* v. *City of Boston*, 8 Cush. 279; *Wyman* v. *Lexington, &c., Railroad Co.*, 13 Metc. 327 (1847); *Crouse* v. *Holman*, 19 Ind. 38 (1862); *Sexton* v. *North Bridgewater*, 116 Mass. 200 (1874); *Hawkins* v. *City of Fall River*, 119 Id. 94 (1875); *Dwight* v. *County Commissioners*, 11 Cush. 203 (1853); *Shattuck* v. *Stoneham Branch Railroad Co.*, 6 Allen 116 (1863); *Whitman* v. *Boston, &c., Railroad Co.*, 7 Allen 316 (1863); *Fowler* v. *County Commissioners*, 6 Id. 96 (1863); *Russell* v. *Horn Pond Branch Railroad Co.*, 4 Gray 607 (1855); *Dickenson* v. *Inhabitants of Fitchburg*, 13 Id. 546 (1859); *Hanlenbeck* v. *Cronkright*, 23 N. J. Eq. 408 (1873); *Somerville, &c., Railroad Co.* v. *Doughty*, 22 N. J. L. 495 (1850).

In a Pennsylvania case (*Kellogg* v. *Krauser*, 14 S. & R. 142 (1826)), the question was the value of mortgaged property, and the opinion of a witness was received. As to the admissibility of this evidence, it was said in the Supreme Court: "The principal reason asssigned by the plaintiff against this evidence was, that an opinion of the value of land is not evidence, because it is not a fact. It is certain that such opinions are every day received as evidence, although it is true that an opinion is not strictly a fact; and it is difficult to conceive how the value of land can be proved without them. The witness may, indeed, prove the prices at which other lands in the neighborhood were sold, but that would not ascertain the value of the land in question without a comparison between it and the land which was sold as to quality; and quality is very much a matter of opinion. It is a kind of evidence so commonly admitted without dispute or defection that I have no doubt of its legality."

In an Illinois case, it was said: "All know that the value of real estate in this country is matter of estimate or conclusion of the mind, arrived at by comparison with sales of like property, made under circumstances calculated to

produce competition among purchasers, and develop the full value, by considering its adaptation to use, present and prospective; its advantages and disadvantages, and upon which those equally well qualified to judge will largely disagree. To describe to a jury a piece of ground, however minutely, with its supposed adaptations to use, advantages and disadvantages, and demand of them, upon this information alone, a verdict as to its value would be merely farcical; and this indeed is all that can be done to enable them to arrive at a conclusion as to its value, unless the witnesses are allowed to state their judgment or opinion, together with the facts upon which such opinion is founded:" *Illinois, &c., R. R. Co.* v. *Von Horn*, 18 Ill. 257 (1857).

"It is well settled in this Commonwealth," says GRAY, J., in a Massachusetts case (*Swan* v. *County of Middlesex*, 101 Mass. 173 (1869)), "that when the value of real estate is in controversy, opinions of persons acquainted with its value are admissible in evidence. These opinions are admitted, not as being the opinions of experts, strictly so called, for they are not founded on study, or training, or professional experience, but rather from necessity, upon the ground that they depend upon knowledge which any one may acquire, but which the jury may not have, and that they are the most satisfactory and often the only attainable evidence of the fact to be proved. * * * The knowledge requisite to qualify a witness to testify to his opinion of the value of lands may either be acquired by the performance of official duty, as by a county commissioner or selectman, whose duty it is to lay out public ways, or by an assessor, whose duty it is to ascertain the value of lands for the purpose of taxation; or it may be derived from knowing of sales or purchases of other lands in the vicinity, either by the witness himself or by other persons."

II. LAND—FARMING LAND AND PRODUCTS. Farmers are experts as to the value of farming land and its products: *Robertson* v. *Knapp*, 35 N. Y. 91 (1866). Thus, in one case, where the defendant, the owner of a brick kiln, was sued by a gardener for injuries to his garden from smoke, the opinion of another gardener concerning the depreciation of his garden and the things growing therein from the nuisance, was admitted: *Vandine* v. *Burpee*, 13 Metc. 288 (1847); *Inhabitants* v. *Chase*, 5 Gray 421 (1855). In another case, the plaintiff claimed damages for the construction of a railroad through his farm, and a farmer was allowed to give his opinion as to the increased expense to the owner in carrying on the farm, arising from the road running through it: *Tucker* v. *Massachusetts, &c., Railroad Co.*, 118 Mass. 546 (1875). In another, A. sued B. for damages caused by B.'s cattle entering his land and destroying his grass, and the opinion of a farmer as to the value of the grass destroyed was admitted: *Townsend* v. *Brundage*, 6 Thomp. & C. 527; 4 Hun 264 (1875). In another, A. sued B. for permitting his cattle to destroy his corn, and a farmer was allowed to express an opinion as to how many bushels of corn there would have been on the land but for the trespass of the animal: *Sickles* v. *Gould*, 51 How. Pr. 25 (1875); *Gould* v. *Day*, 94 U. S. 405 (1870). In another, A. sued B. for injury to his cattle by falling through B.'s wharf, and the opinion of a stock-raiser as to the damage done to the cattle was received: *Polk* v. *Coffin*, 9 Cal. 56 (1858); and see *Snyder* v. *Western Union Railroad Co.*, 25 Wis. 60 (1869).

III. GOODS AND CHATTELS. "Market value," said Mr. Justice STORY, in an early case (*Alfonso* v. *United States*, 2 Story 421 (1843)), "is necessarily a matter of opinion as well as of fact, or rather of opinions gathered from facts. How are we to arrive at it? Certainly not by the mere purchase made by a

single person, or by purchases made by a few persons; for in either case they may have purchased above or below the market price, or the market price may be fluctuating, and the sales too few to justify any general conclusion. Buyers may refuse to buy at a particular price; sellers may refuse to sell at a lower price. In this state of things, we must necessarily resort to opinions of merchants and others conversant in trade for their opinions, what, under all the circumstances, is the fair market price or value of the goods. The market price or value therefore must, in most cases, if not in all, be a matter of fact mixed up with opinion, for it must necessarily include a general price or value in the market deducible from various averages and approximations and the different qualities of the same class of goods. In the next place the knowledge of the market price being thus in fact a matter of skill, judgment and opinion, it is in no just sense mere hearsay; but it is in the nature of the evidence of experts." So it is held in a number of cases, that as in the case of land, witnesses may express their opinions as to the value of goods and chattels: *Whitfield* v. *Whitfield*, 40 Miss. 352 (1866); *Continental Ins. Co.* v. *Horton*, 28 Mich. 173 (1873); *Laurent* v. *Vaughn*, 30 Vt. 90 (1858); *Watry* v. *Hiltgen*, 16 Wis. 516 (1863); *Brooks* v. *Hazen*, 3 G. Greene 553 (1852); *Burger* v. *Northern Pacific Railroad Co.*, 22 Minn. 343 (1876); *Hudson* v. *State*, 61 Ala. 333 (1878); *Gulf City Ins. Co.* v. *Stephens*, 51 Id. 121 (1874); *Booker* v. *Adkins*, 48 Id. 529 (1872); *Hood* v. *Maxwell*, 1 W. Va. 239 (1866); *Ward* v. *Reynolds*, 32 Ala. 384 (1858); *Gonzales College* v. *McHugh*, 21 Texas 256 (1858); *Laurence* v. *City of Boston*, 119 Mass. 126; *Brackett* v. *Edgerton*, 14 Minn. 174 (1869); *Seyfarth* v. *St. Louis, &c., Railroad Co.*, 52 Mo. 449 (1873); *Thatcher* v. *Kaucher*, 2 Col. 698 (1875); *Rogers* v. *Ackerman*, 22 Barb. 135 (1856); *Whelan* v. *Lynch*, 60 N. Y. 469 (1875); *Haskins* v. *Hamilton Mutual Ins. Co.*, 5 Gray 436 (1855); *Davis* v. *Elliott*, 15 Id. 90 (1860); *Beecher* v. *Denniston*, 13 Id. 354 (1859); *Whitney* v. *Thacher*, 117 Mass. 526 (1875); *Draper* v. *Sexton*, 118 Id. 428 (1875); *Tiffany* v. *Lord*, 65 N. Y. 310 (1875). Thus, the question being as to the value of a stove, a witness acquainted with the value of stoves may testify as to the value of a particular stove: *Smith* v. *Hill*, 22 Barb. 656 (1856); the question being as to the value of a tavern stand, the opinion of a witness was admitted: *Clark* v. *Baird*, 9 N. Y. 183 (1853); the question being as to the value of materials for making clothing, the opinion of a clothing manufacturer was received: *Browning* v. *Long Island Railroad Co.*, 2 Daly 117 (1867); the question being the value of a house destroyed by fire, the opinions of carpenters were received: *Bedell* v. *Long Island Railroad Co.*, 44 N. Y. 367 (1871). So, on the question of the value of lumber used in the construction of a house, the opinion of a carpenter is admissible: *Simmons* v. *Carrier*, 68 Mo. 416 (1878); and on the question of the value of water for milling purposes, the opinions of millers are relevant: *Read* v. *Barker*, 30 N. J. L. 378 (1863); s. c. 32 Id. 477 (1865). "The value of commodities is usually a matter of opinion, and those acquainted with an article and its value may express their judgment, their belief, or opinion in the matter:" Id. In another case (*Tebbetts* v. *Haskins*, 16 Me. 288) (1839), a suit for the value of material and labor employed in building a house, master builders were permitted to give their opinions as to the expense which had been incurred in erecting the building. An action was brought for breach of warranty in the sale of a cow, that she was good and young. The opinions of witnesses as to what the cow

would have been worth if good and young, and what she would have been worth, provided she gave four quarts of milk a day, were admitted. "The rule that a witness must state facts and not opinions," said the court, "does not apply to cases like the present. How else than by the opinions of witnesses could the difference between an article delivered and the sample by which it was sold be determined?" *Joy* v. *Hopkins*, 5 Denio 84 (1847).

And, generally, the value of animals may be proved by opinion: *Miller* v. *Smith*, 112 Mass. 471 (1873); *White* v. *Thomas*, 39 Ill. 228 (1866); *Rawles* v. *James*, 49 Ala. 183 (1873); *Cantling* v. *Hannibal, &c., Railroad Co.*, 54 Mo. 385 (1873); *Anson* v. *Dwight*, 18 Iowa 244 (1865); *Brill* v. *Flagler*, 23 Wend. 350 (1840); *McDonald* v. *Christie*, 42 Barb. 36 (1863). Where A. sued B. for pasturing his cattle at different times during the spring, summer and autumn, the opinions of farmers that it was worth more to pasture transiently than by the season, were admitted: *Cornell* v. *Dean*, 105 Mass. 435 (1870).

IV. Value of Services Generally. In like manner, the value of services, in an action therefor, may be arrived at by evidence of opinion: *Hatton* v. *Weems*, 12 G. & J. 83 (1841); *Lee* v. *Pindle*, 12 Id. 288 (1842); *Eldridge* v. *Smith*, 13 Allen 140 (1866); *Kendall* v. *May*, 10 Id. 59 (1865); *Fitchburg Railroad Co.* v. *Freeman*, 12 Gray 401 (1859). The value of the services and labor of a mechanic may be proved by the opinion of another mechanic: *McCollum* v. *Seivard*, 62 N. Y. 316 (1875); *Shafer* v. *Dean*, 29 Iowa 144 (1870); *Crawford* v. *Wolf*, 29 Id. 568 (1870); *Eagle, &c., Manif'g Co.* v. *Browne*, 58 Ga. 240 (1877); *Mercer* v. *Vose*, 40 N. Y. (S. C.) 219 (1875). And what it is worth to put a certain quantity of lumber into a house may be shown by the opinion of a carpenter and builder: *Hough* v. *Cook*, 69 Ill. 581 (1873); and see *Moore* v. *Lea*, 32 Ala. 375 (1858). Where a party sued for services in purchasing a mill for the defendant, the opinion of a real estate broker, as to the value of his services, were admitted: *Etting* v. *Sturtevant*, 41 Conn. 176 (1874). And the value of the services of a bookkeeper may be proved by another bookkeeper: *Scott* v. *Lilienthal*, 9 Bosw. 224 (1862).

V. Value of Services—Lawyers. An ordinary witness cannot testify as to the value of services performed by an attorney: *Smith* v. *Kobbe*, 59 Barb. 289 (1871); *Hart* v. *Vidal*, 6 Cal. 56 (1856). An attorney, on the other hand, is an expert on this question, and, therefore, where one lawyer brings an action on a bill for legal services, it is the proper and usual mode to call another lawyer as a witness, and to ask him, considering the amount in controversy, the legal questions involved, and the importance of the case, what, in his opinion, is the value of the plaintiff's services: *Ottawa University* v. *Parkinson*, 14 Kans. 160 (1875); *Covey* v. *Campbell*, 52 Ind. 157 (1875); *Allis* v. *Day*, 14 Minn. 516 (1869); *Jevne* v. *Osgood*, 57 Ill. 340 (1870); *Central Branch Railroad* v. *Nichols*, 24 Kans. 243. "The question is one as to which, from the nature of the case, it is not practicable to furnish more definite evidence than the opinions of witnesses who show themselves qualified to form well-grounded estimates of such value by their familiarity with the department of business in which such services have been rendered. Services performed by members of the legal profession in conducting litigation, fall, we think, within this principle. There is no fixed standards by which their value can be determined; their value and reasonable price vary with the magnitude and importance of the particular case, the degree of responsibility attaching to its management, the difficulty of the questions involved, the ability and reputation of

counsel engaged, the labor bestowed, and other matters which will readily occur to the profession. The experience and knowledge of ordinary jurymen do not qualify them to form an opinion as to the value of services of this kind; the case is not one where the opinions of witnesses should be excluded because they are no better than the opinions of the jurymen themselves. On the other hand, practising lawyers occupy the position of experts as to questions of this nature; from the character of their business, they are not only in the habit of estimating the value of professional services, but they enjoy peculiar advantages for so doing; their opinions of such value should therefore be received, not only because they are qualified to form them, but because it appears to be impracticable to furnish any more satisfactory evidence:" *Allis* v. *Day*, 14 Minn. 516 (1869). The lawyer may give his opinion on the value of the services rendered, either from his own personal knowledge as to what the services were, or from their extent and nature as testified to by another witness in the case, or by the plaintiff himself: *Brown* v. *Hufford*, 69 Mo. 305 (1879); *Beekman* v. *Platner*, 15 Barb. 550 (1853). Or he may give his opinion on a hypothetical case: *Williams* v. *Brown*, 28 Ohio St. 547 (1876).

VI. WITNESS NEED NOT HAVE SEEN THE PARTICULAR THING. It is not necessary, to make his opinion competent, that the witness should have been acquainted with the particular thing whose value he testifies to, or even that he should have ever seen it. Where a railroad company was sued for having destroyed, by means of fire from its locomotives, a number of the plaintiff's fruit trees, the opinion of a nursery man as to the value of the trees destroyed was admitted, he having previously learned from other witnesses the kind of trees they were. "It was not necessary," said JOHNSON, J., "that he should actually have seen or been familiarly acquainted with the trees in question. It was enough that he was acquainted with the fruit business in that neighborhood, and the value of similar property there. He was, I think, as competent to express an opinion in respect to the value of the trees, after learning from other witnesses what kind of trees they were, and the quality and amount of fruit yielded by them generally, as he would have been to express an opinion of the value of the fruit per barrel after ascertaining its condition and quality:" *Whitbeck* v. *New York, &c., Railroad Co.*, 36 Barb. 644 (1862). So, where the plaintiff sued the defendant for cutting down timber on his land, a witness, from the size and appearance of the stumps, gave his opinion of the trees: *Frantz* v. *Ireland*, 66 Barb. 386 (1873). And where the question was as to the value of farming land mortgaged, a farmer living twenty-five miles from where it was situated was allowed to give his opinion: *Stone* v. *Covell*, 29 Mich. 360 (1874). In *Lawton* v. *Chase*, 108 Mass. 238 (1871), the question was as to the market value of a peculiar kind of logs at a certain place, and the opinion of a witness whose knowledge was acquired by dealing in such logs for several years at a place ten miles distant, and afterwards at a place forty miles distant, was admitted. In *Mish* v. *Wood*, 34 Penn. St. 451 (1859), an action of trover had been brought for the conversion of five trunks of clothing belonging to the plaintiff. The latter described the articles contained in the trunks, and then one E., a dealer in clothing and fancy goods, gave his opinion as to their value. It was objected that as the witness had not seen the goods in question he was not qualified to speak of their value. But the court ruled otherwise. "What," said THOMPSON, J., "is to prevent a merchant from testifying in corrobora-

tion of an invoice as to values, where no values are given, when goods are lost? The fact of the existence or loss of the goods is not touched by such testimony. That remains to be established by other evidence. I think I have known many instances of this kind. If a trunk should be packed by a servant incapable of placing a value on the wardrobe of his or her master or mistress, although able to testify to each article and describe its quality yet wholly incompetent to give the slightest idea of the real value of the articles, in case of loss, how is the value to be ascertained but by the testimony of a tradesman acquainted with the value of such articles, based upon a description of them? So, in regard to furniture insured and lost by fire; it can hardly be doubted, but that it would be competent to fix the value by persons acquainted with such matters, and competent, as such, to testify, after its quality has been described. If the rule be that only persons who have seen the articles which have been lost can give an estimate of their value, then in all the cases suggested, there would be a failure to recover for a loss, or the jury would be left to guess at their value." In another case (*Orr* v. *Mayor of New York*, 64 Barb. 106 (1872)), an action was brought against a municipality, for the destruction of a floating elevator. On the question of its value, a witness, from a description of the property, was permitted to express an opinion of its value. This, on appeal, was held proper. "It is not necessary," said the court, "that a witness, in speaking of value, should only speak from actual observation. Many cases may occur where, from the destruction of personal property, no witness can be produced who has had an opportunity to examine and be conversant with the value. In such a case, the rule which allows the next best evidence to be produced applies, and the value may be ascertained from persons conversant with such machinery, after they are made acquainted with its condition by the testimony of others."

Nor in the case of the market value of goods at a particular place is the opinion of a merchant acquainted with that value, inadmissible because he does not live at that place. Thus, a merchant at a place of import may give his opinion on the market value of particular goods at the place of export—and that even in another country. In a case before Mr. Justice STORY, in 1843, a question arose as to the market value of sugar in Cuba, and that learned judge admitted the testimony of merchants and appraisers of the custom house in Boston: *Alfonso* v. *United States*, 2 Story 421 (1843). A witness may give his opinion upon the relative value of two articles, though ignorant of the actual value of either: *Kronschnable* v. *Knoblaugh*, 21 Minn. 56 (1874). But the value of logs at one place cannot be proved by the opinion of a witness having no knowledge of values there, and showing no facts from which it could be got at as compared with values elsewhere: *Greeley* v. *Stilson*, 27 Mich. 153 (1873).

VII. VALUE OF USE OF PROPERTY. The value of the use of property as well as the value of the property itself may be proved by opinion. In *Sturgis* v. *Knapp*, 33 Vt. 531 (1860), the question in dispute was as to the value of a railroad during the time it was in the hands of a receiver. The court admitted the opinions of witnesses acquainted with the business of the road and the expense of operating it, saying: "The value of property, as a general rule, can be proved only by the opinions of witnesses: so too of the value of the use of property, its value and the value of its use often depends much upon its location, and the circumstances under which it is or may be used. The use of property may be

of much greater value to one person than it is to another, owing to the skill or facilities for its use possessed by the one that the other has not. To determine the value of the use of a piece of property to a particular person under the circumstances of a given case often requires the exercise of much skill and judgment that can be acquired only by experience and familiarity with the subject-matter, such as ordinary triers may not and probably would not possess." In *Butler* v. *Mehrling*, 15 Ill. 488 (1854), an action was brought for damages for the detention of property, a number of horses and other chattels which had been trained and used for circus purposes. The opinions of persons who had experience in circus exhibitions were admitted to prove the value of the use of the property during that period of detention. "In valuing the property itself," said the court, "but little weight would be given to one who knew nothing of the property. But in valuing its use, those acquainted with the kind and use of such property, may be allowed to testify as to the value of the use of such property, and such opinions may be weighed, together with similar opinions of those who know the property itself." Thus the question is as to the value of the use of a horse and wagon. The opinions of persons who have bought and sold horses and wagons, and have used such in their business, are competent: *Brady* v. *Brady*, 8 Allen 101 (1864).

VIII. Opinions on Matters outside Occupation. In testifying to the value of land, the witness' opinion is restricted to those matters to which, from his occupation, he is presumed to be peculiarly fitted to express an opinion. This limitation is well illustrated in a recent case in Rhode Island. The owner of land claimed damages from a railroad company on account of the construction of their line over a part of his property. A farmer, living in the vicinity, was introduced to express an opinion as to the value of the land appropriated, but the court refused to admit his testimony, on the ground that he could only properly express an opinion as to the *value of land for farming purposes*, and the land in question had another value. "It would be proper," said the court, "to permit a farmer living in the vicinity of farming land which has been taken and with which he is familiar, to testify what in his opinion is its value for farming purposes. A farmer by his experience and by his association with other farmers may be assumed to have peculiar means of information which qualify him to give an opinion as an expert upon that question. In any case, where farming land is taken an answer to the question so restricted might afford light, and of course if the land was valuable only for farming purposes, would be equivalent to the witness giving his opinion of the saleable or market value. But many farms in this state have a value quite independent of their value for farming purposes. For instance, the value of a farm lying near a growing city or village or on the line of a railroad is often very greatly enhanced by the probability that it may be in demand for house lots. And many farms lying along Narragansett Bay, are much more highly prized for their attractiveness as summer resorts than for their value simply, as farms. And so a farm may be valued for some other natural or artificial claims or peculiarity which adds nothing to it for agricultural purposes. Values of this sort are just as real as any other, but they are not such as farmers are specially qualified to appraise, and therefore to allow farmers to give their opinion without restriction whenever farming lands are taken would be quite as likely to result in the introduction of misleading as of enlightening testimony:" *Brown* v. *Providence, &c., Railroad Co.*, 12 R. I. 238 (1878). So the opinion of a farmer as to the value of goods in a store: *Teerpenning* v. *Commissioners' Exchange Ins. Co.*, 43 N. Y. 279 (1871), or the value of the services

of a clerk (*Lamoure* v. *Caryl*, 4 Denio 370 (1847)), is inadmissible.

IX. WITNESS CANNOT ASSESS DAMAGES. While a witness, properly qualified, may express an opinion concerning the value of an article, it is uniformly held that he cannot usurp the functions of the jury and assess damages: *Van Deusen* v. *Young*, 29 N. Y. 27 (1864); *McGregor* v. *Brown*, 10 Id. 119 (1854); *Benkard* v. *Babcock*, 27 How. Pr. 406 (1864); *Atlantic, &c., Railroad Co.* v. *Campbell*, 4 Ohio St. 583 (1853); *Cleveland, &c., Railroad Co.* v. *Ball*, 5 Id. 568 (1856); *Sinclair* v. *Roush*, 14 Ind. 450 (1860); *Dalzell* v. *City of Davenport*, 12 Iowa 440 (1861); *Brunswick, &c., Railroad Co.* v. *McLaren*, 47 Ga. 546 (1873); *Evansville, &c., Railroad Co.* v. *Fitzpatrick*, 10 Ind. 120 (1858); *Mitchell* v. *Allison*, 29 Id. 43 (1867); *Kirkpatrick* v. *Snyder*, 33 Id. 170 (1870); *Dalzell* v. *City of Davenport*, 12 Iowa 437 (1861); *Russell* v. *City of Burlington*, 30 Id. 262 (1870); *Cannon* v. *Iowa City*, 34 Id. 203 (1872); *Prosser* v. *Wapello Co.*, 18 Id. 327 (1865); *Grinnell* v. *Mississippi, &c., Railroad Co.*, 18 Id. 570 (1864); *Liles* v. *New Orleans, Canal, &c., Co.*, 11 Rob. (La.) 92 (1845); *Holland* v. *Cammett*, 5 La. Ann. 705 (1850); *Roberts* v. *Commissioners*, 21 Kans. 247 (1879); *Bissell* v. *Wert*, 35 Ind. 54 (1871); *Hames* v. *Brownlee*, 63 Ala. 277 (1879); *Simms* v. *Monier*, 29 Barb. 419 (1859); *Duff* v. *Lyon*, 1 E. D. Smith 536 (1852); *Tingley* v. *City of Providence*, 8 R. I. 493 (1876); *Brown* v. *Providence, &c., Railroad Co.*, 12 Id. 238 (1878); *Newton* v. *Fordham*, 7 Hun 59 (1876); *Thompson* v. *Dichart*, 66 Barb. 604 (1873). Thus, where the question was as to what damage a certain piece of land had sustained by the defendant's having cut down a number of trees which grew upon it, it was ruled that while a witness, a farmer, might testify that the land was worth $50,000 before the cutting down of the trees and only $1000 after, he would not be allowed to say to what amount in his opinion the land had been depreciated. "The witness," said the court, "cannot make the subtraction himself, and declare the result:" *Van Deusen* v. *Young*, 29 N. Y. 20 (1864). *Norman* v. *Wells*, 17 Wend. 136, decided in New York in 1837, is a much cited case on this proposition. In that case the court say: "The ordinary and in general the only legal course is to lay such facts before the jury as have a bearing on the question of damages, and leave them to fix the amount. They are the only proper judges. They are impartial and capable of entering into these ordinary matters. Witnesses are, in such cases, unavoidably governed by their feelings and their prejudices, gathered from many sources. * * * No case was cited by counsel where evidence of opinion, as to the amount of damages sustained, has ever been sanctioned as legal. The amount of indemnity, where it is not capable of being reached by computation, is always a question for the jury. If there be any rule without exception it is this, and I have been unable to find any instance where the opinion of witnesses has been received. * * * It is no reason for receiving such evidence that the defendant may cross-examine. That he might do of course and the trial might thus be protracted to an amazing length in taking opinions from the neighborhood." Where the question was as to the amount of damages sustained by a party through his mill lying idle, the opinion of a witness on this point was inadmissible: *Dolittle* v. *Eddy*, 7 Barb. 74 (1849). So, where the question was as to the amount of damage sustained by property on account of the maintaining of a nuisance: *Fish* v. *Dodge*, 4 Denio 311 (1847), or the putting out of a fire: *Simons* v. *Monier*, 29 Barb. 419 (1859). In *Morehouse* v. *Mathews*, 2 N. Y.

514 (1849), an action was brought for damages caused by the plaintiff's cattle being fed on hay inferior to that which the defendant had contracted to feed them upon. A witness was asked what damage the cattle had sustained thereby, and he answered that he thought the damages would be about fifty dollars. On appeal the admission of this testimony was declared erroneous. "The witness," said SHANKLAND, J., "could have legally testified to the degree of inferiority of the hay fed to that agreed to be fed by the defendant. He could also have testified as to the condition of the cattle when brought to the defendant's and when taken away, and to any other fact calculated to enable the court or jury to form a just opinion on the question of damages; but the mere opinion of the witness on the amount of damages was entitled to no weight. If the witness had testified that he was acquainted with the value of cattle, I think he might have been allowed to state how much less valuable these were when taken away than when driven to the defendant's in consequence of the inferior quality of the food." In *Harger* v. *Edmonds*, 4 Barb. 258 (1848), the opinion of a witness as to the amount of damages sustained by the plaintiff by the deprivation or withdrawal of water from a tavern was rejected; as was the opinion of a boat builder in *Paige* v. *Hazard*, 5 Hill 603 (1843), as to the damages sustained by a boat negligently run down and sunk; the opinion of a witness in *Dunham* v. *Simmons*, 3 Hill 609 (1842), as to the damage sustained by a horse from its being overridden; the opinions of witnesses as to the amount of damage that the business of the plaintiff had sustained by reason of an injury which he had received on the defendant's railroad: *Lincoln* v. *Saratoga, &c., R. R. Co.*, 23 Wend. 434 (1840).

But, as pointed out by SELDEN, J., in a New York case (*Rochester, &c., Railroad Co.* v. *Budlong*, 10 How. Pr. 293 (1854)), in many cases the two questions are identical—the amount of damages sustained depending entirely upon the question of value. An action is brought on a warranty of a horse; the animal is proved to have such a defect as to amount to a breach of the warranty. A witness properly qualified to testify on the subject may give his opinion as to the value of the horse as he turned out to be and as to his value if he had been as warranted. The jury are left to make the subtraction, and the result constitutes the damages in the case. But why should not the question be: What damages has the plaintiff sustained by reason of the breach of the defendant's warranty? The answer would be precisely the same as to the previous question, and yet in this form the question would be improper, because it would involve a question of law, for damages is a legal term, and the rule of damages is in all cases a question of law. But if the question were so framed as to call for the difference in value of the horse, and nothing more, it should be no objection to it that the word "damages" was used. It would be absurd to exclude the question as calling for an opinion as to damages and not as to value; the difference is merely verbal. In *Rochester and Syracuse Railroad Co.* v. *Budlong*, 10 How. Pr. 293 (1854), on the injury to the plaintiff's farm, arising from the construction of a railroad, the following questions were put to a witness: "What in your opinion will be the injury to the residue of B.'s farm, occasioned by the construction of the proposed railroad through it? What would be the diminution in value of the two fields north and south of the proposed railroad, by the construction thereof?" In the Supreme Court these questions were held to be proper. "These questions," said the court, "related, one to the whole farm, and the other to portions of it only. In other respects they were identical. There

is no difference between an inquiry as to the *damage* or injury which would be done to the land by the construction of the road, and as to its *diminution in value* in consequence of such construction. * * * The idea that opinions are not to be received on a question of damages is a fallacy. It has arisen from the fact that questions upon that subject have been sometimes so framed as to embrace the legal rule or measure of damages, and at others so as to include too many particulars upon some of which the jury might be as competent to judge as the witnesses; or if not, particulars which should be given to the jury in connection with the opinion, to enable them properly to estimate its value."

X. Weight of Opinions as to Value. The opinions of attorneys, testifying to the value of lawyers' services, however, are not conclusive on the jury, who may act independently or in opposition to them, applying to the case their own experience and knowledge of the character of the services: *Anthony* v. *Stinson*, 4 Kans. 211 (1867). It is therefore error to instruct the jury what is the proper compensation is to be determined from the professional evidence, and not from their own knowledge or ideas on the subject: *Head* v. *Hargrave*, 105 U. S. 45. The same is true of the opinions of other experts: *Green* v. *City of Chicago*, 97 Ill. 374 (1881). The opinion in the principal case is in conflict with the principle laid down in these decisions.

A court on appeal will not set aside a verdict because the jury have given preference to the opinions of one class of experts. Thus, in an Illinois case, there had been a trial before a jury to assess damages for a railroad crossing a farm. Eight witnesses were examined. Of these four were mechanics and engineers who thought that the value of the land had been increased by the road crossing it. The other four were farmers, and they were of the opinion that its value was decreased from $1000 to $2000. The jury returned a verdict for $800, which the court on appeal refused to disturb. "From their occupation," said the court, "they (the farmers) had a better opportunity of estimating the injury and inconvenience occasioned to this farm by the construction of this road, than mechanics or persons engaged in other pursuits. And in such a conflict the jury were justified in giving the preference to their testimony:" *Jacksonville, &c., Railroad Co.* v. *Caldwell*, 21 Ill. 75 (1859).

XI. Conjectural Opinions. Opinions must not be based too much on conjecture. In *Wesson* v. *Washburn Iron Co.*, 13 Allen 100 (1866), an action for a nuisance, a part of the complaint was that the defendants' factory had diminished the rental value of the plaintiff's property. To controvert this, the defendants introduced several persons who had bought, sold and let real estate in the vicinity for several years, and were acquainted with its value, and asked them: "What would have been the effect of the stoppage of the works of the defendants upon the value for occupation of the houses of the plaintiff?" The witnesses answered that in their opinion, it would have materially diminished their value. On appeal this testimony was held inadmissible. "The opinions," said the court, "were too speculative and conjectural to be admissible, as coming within the range allowed to the testimony of experts. It is to be observed that the question put to the witnesses was not as to the actual present value of property, or as to the extent of damage already actually done by the acts of the defendants, as in *Vandine* v. *Burpee*. But the inquiry was directed to the probable damage which would ensue to the plaintiff's property, in the happening of a contingency which might never occur."

So in *Burt* v. *Brigham*, 117 Mass. 306 (1875), (and see *Fairbanks* v. *Inhabitants*, 110 Id. 224) (1872), the plaintiff had filed a petition to assess damages for land of his which had been appropriated by the United States for the purpose of a post-office. On the trial an expert in the values of land was asked: "What would be the fair rental value of the land in question with a suitable and proper building on it. His opinion was held inadmissible. "The matter to be determined by the jury," said the court, "was the market value of the land at the time of the filing of the petition. In estimating that value the jury might doubtless take into consideration the uses to which the land might properly be applied, and witnesses acquainted with the market value of the land in its existing condition at that time, might testify to the fact of what that value was, and state their reasons for that opinion. But testimony as to what would be the fair rental value of the land with a suitable and proper building upon it, related to matter of opinion as to the future, not of present fact, and was too prospective and indefinite in its nature to be competent evidence of the present value of the land not built upon." In Kentucky it has been held that in estimating the value of a potential right of dower, the opinions of witnesses are not to be relied on; but that standard tables on the subject are better: *Lancaster* v. *Lancaster*, 78 Ky. 198 (1879).

XII. Conflicting Rule in New Hampshire. It was early laid down in New Hampshire that the opinions of witnesses as to the value of land were not admissible, the court, in the earlier cases, taking the view that such evidence was not necessary, as the jury, being freeholders, were sufficiently acquainted with the value of land in the state to dispense with the opinion of others: *Rochester* v. *Chester*, 3 N. H. 349 (1826); *Town of Peterboro* v. *Town of Jaffrey*, 6 Id. 462 (1833). The proper method was said to be for the witnesses to testify to the quantity, quality, location, state of improvement and cultivation of the land, and leave it to the jury to draw their own conclusions therefrom. Nevertheless it was ruled that a witness might testify as to the market value of a thing at a particular place—the price that it would cost—this being it was said a matter of fact and not of opinion: *Whipple* v. *Walpole*, 10 N. H. 130 (1839); *Hoitt* v. *Moulton*, 21 Id. 590 (1850). Neither can value of goods and chattels be proved by opinion in New Hampshire: *Low* v. *Railroad*, 45 N. H. 370 (1864); *Beard* v. *Kirk*, 11 Id. 397 (1840); *Robertson* v. *Stark*, 15 Id. 109 (1844). Though a witness may state the market value of an article if he is acquainted with it: *Beard* v. *Kirk*, 11 N. H. 397 (1840). This latter, it is said is speaking to a fact, while the former is mere opinion, and opinion too on questions which do not require any special study and skill to qualify one to speak of them. But where the matter is one of art or skill, and the witness is properly qualified, then even in New Hampshire his opinion is admissible. In *Hackett* v. *Railroad*, 35 N. H. 398 (1857), the question was as to the value of certain lumber, and a witness in the lumber business was permitted to give his opinion on the subject. "To judge of the qualities of lumber," said the court, "is to a great extent a matter of art and skill peculiar to those whose business renders them conversant with matters of this kind. The opinion of the witness, if he is shown to possess skill, is in such case properly admissible."

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